Petition

81-1777

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ALBERT MENGARELLI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court review the decision of the Ninth Circuit Court of Appeals which held, contrary to prior decisions of other Circuits, that a defendant may be denied a continuance when he cannot attend his trial due to hospitalization and the Government shows no resulting prejudice?

2. Should this Court review the decision of the Ninth Circuit Court of Appeals which upheld the use, contrary to decisions of other Circuits, of subsequent evidence of wrongdoing to impose liability in a prior period in which there was no evidence of wrongdoing?

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IN THE

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No.

ALBERT MENGARELLI,

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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ALBERT MENGARELLI, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

On November 4, 1981, the Ninth Circuit Court of Appeals entered its memorandum opinion affirming judgment in favor of the Government in the sum of $773,553.92 for Appellant's violation of Section 4401 of the Internal Revenue Code of 1954 (wagering excise tax) and 26 U.S.C.

6653 (b) (fraud). The opinion is set out in full in Appendix A. (Appellant's partner was also assessed with liability, but has not appealed).

Petitioner petitioned the Court of Appeals for a rehearing on November 17, 1981. (See Appendix B). On December 16, 1981 the Court of Appeals denied said rehearing. That Order is set out in full in Appendix C.

JURISDICTION

Jurisdiction of the Court to review the decision of the Ninth Circuit Court of Appeals is granted by 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS

35 U.S.C. 4401 (c) which states as follows:

"§4401. Imposition of tax.

(c) Persons liable for tax. Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery. Any person required to register under section 4412 who receives wagers for or on behalf of another person without having registered under section 4412 the name and place or residence of such other person shall be liable for and shall pay the tax under this subchapter on all such wagers received by him."

26 U.S.C. 6653 (b) which states as follows:

"§6653. Failure to pay tax.

(b) Fraud. If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a). In the case of a joint return under section 6013, this subsection shall not apply with respect to the tax of a spouse unless some part of the underpayment is due to the fraud of such spouse.

STATEMENT OF THE CASE

On December 11, 1979, judgment was entered against Petitioner by the District Court for the District of Nevada for underpayment of federal excise taxes on wagering and penalties. The judgment, based on a jury verdict by special interrogatories, was in the sum of $773,552.92.

At trial, Petitioner requested a continuance due to his hospitalization. In support of Petitioner's motion, letters from two doctors and an affidavit from his counsel were submitted. One letter documented Petitioner's condition and stated that he had been hospitalized, was undergoing extensive tests and was on medication. The lower court denied the motion without prejudice.

At the conclusion of the Government's case, Petitioner renewed his motion for continuance. By this point in time, the Government had investigated the claims of Petitioner at the request of the lower court and reported to the court that "there is substance to [Petitioner's] condition at this point, the fact that he is hospitalized." The Government substantiated all of the claims of Petitioner and never once did they suggest that Petitioner was acting in bad faith.

This second motion was again denied. The Government, despite the fact that they verified Petitioner's condition, opposed every motion for continuance made by Petitioner. While the Government openly recognized the importance of Petitioner's presence, it opposed the motions based on inconvenience: their extensive preparation, exhibits had been brought to the courtroom, and out of town witnesses were present. No other basis for opposing the motions was ever offered. The jury was never informed as to the reasons for the failure of Petitioner to be present or to take the stand.

At trial, the Government put into evidence information gathered from their surveillance of Petitioner's place of business from February, 1964, to January, 1966. In late February, 1966, the Government seized certain records of Petitioner's and also placed them into evidence. Based on these two sources, the Government projected that Petitioner had failed to pay over one million dollars in taxes, and over one-half million dollars in penalties.

The jury concluded that Petitioner had failed to pay tax on a portion of wagers from February, 1964 to February, 1966. Throughout 1964, Petitioner testified in deposition to accepting special wagers ("white slips") and paying the tax himself rather than passing it on to the customer. The Government's agent, who placed Petitioner's place of business under surveillance during 1964, never placed an illegal bet and was aware that Petitioner was paying the tax himself on some wagers with regular patrons. Testimony from the Government's agent thus supported Petitioner's testimony. In the first three months of 1965, no surveillance was conducted by the Government.

The jury, by special interrogatories, rejected the projected liability of Petitioner by the Government, but still found that Petitioner had failed to report and pay tax on a per-

centage of wagers; a different percentage was assessed for each month. The percentage found by the jury was divided into gross wagers despite the fact that Petitioner operated both a race book and a sports book. The Government never seized any records demonstrating that illegal *sports* wagers were taken by Petitioner. In fact, there is no evidence of any kind prior to April, 1965, that suggests sports wagers were involved.

Due to the fact that Petitioner's counsel at trial failed to make the proper post-trial motions, the appeal was based on the plain error rule. See *Centraal Stikstof Verkoop Kavter, N.V. v. Walsh Stevedoring Co.*, 380 F. 2d 523 (5th Cir. 1967). Due to this procedural posture, Petitioner is only contesting the judgment as to all of 1964, and the first three months of 1965. As to the rest of the jury verdict, Petitioner still contests the conclusion, but admits that there is sufficient evidence to overcome the plain error rule.

REASONS FOR GRANTING THE WRIT

I.

THE NINTH CIRCUIT HAS UPHELD THE DENIAL OF A MOTION TO CONTINUE WHERE THE REQUESTING PARTY WAS HOSPITALIZED AND THE GOVERNMENT DEMONSTRATED NO RESULTING PREJUDICE, THEREBY CREATING A CONFLICT WITH PRIOR DECISIONS OF OTHER CIRCUITS.

Petitioner appealed from the lower court's denial of his motions to continue and the Ninth Circuit Court of Appeals affirmed the decision. In Memorandum opinion of the Ninth Circuit, the court concluded that "[T]he trial judge balanced the inconvenience of the parties, the jury, and the Court,

together with the speculative nature of the representations about [Petitioner's] condition and the lack of any solid reason to believe that [Petitioner] would ever be available for trial". The court continued that "[Petitioner's] counsel had offered no substantial factual information about the illness. . . . " Based on these considerations it was held that it was no abuse of discretion for the trial court to have denied the motions for continuance.

The Ninth Circuit's opinion is simply in conflict with the evidence and with the decisions of the other Circuits. Where a moving party demonstrates a health condition and the opponent offers no showing of substantial prejudice, the absence of a party is presumed to be prejudicial, and it is reversible error to deny a continuance. See, e.g., *Gaspar v. Kassm,* 493 F. 2d 396 (3rd Cir. 1974).

In *Cornwell v. Cornwell,* 118 F. 2d 396 (D.C. Cir. 1941), appellant was deposed prior to trial. Upon the trial date appellant provided an affidavit of illness stating that she was suffering from a nervous condition brought on by the stress of the case and was under the care of a physician. The lower court denied her motion for continuance. The appellate court reversed, stating that it was reversible error to deny a motion for continuance where the record showed a serious condition, good faith, and no serious injury to the opponent. Accord, *Latham v. Crofters, Inc.,* 492 F. 2d 913 (4th Cir. 1974); *Gaspar,* supra; *Royster v. Lederle,* 128 F. 2d 197 (6th Cir. 1942); *Harrah v. Morgenthau,* 89 F. 2d 863 (D.C. Cir. 1937).

None of the above authorities find that a "balancing of inconveniences" is the appropriate method of determination. Where the appropriate factors are shown, it is reversible error to deny the motion. In the instant case, despite the conclusions of the Ninth Circuit, an affidavit by Petition-

er's counsel and two letters from doctors were submitted to the court. The Government never suggested that the condition was contrived and, indeed, their own investigation concluded that Petitioner's condition was serious and that he was legitimately hospitalized. All of the evidence points to a serious health condition.

Lastly, the Government never demonstrated any resulting prejudice from a continuance. Indeed, they never even argued that they would be prejudiced. They merely asserted that they would be inconvenienced because they had prepared for trial, brought exhibits to the courtroom, and had out-of-town witnesses. These were the *sole* reasons provided for opposing the continuance.

In the other Circuits which have considered this issue, it is clear that there should be no balancing of inconvenience. The rule in the other Circuits is that a continuance must be granted where there is a serious health condition and no resulting serious prejudice. And it is clear that prejudice does not arise from inconvenience. See, e.g., *Cornwell,* supra. The very reasons provided by the Ninth Circuit as justification for their ruling, are in conflict with the other Circuits. Indeed, the ruling is in conflict with sound principles of due process surrounding the presence of a defendant and the prejudice that results from his absence.

II.

THE NINTH CIRCUIT HAS UPHELD THE USE OF SUBSEQUENT EVIDENCE OF WRONGDOING TO IMPOSE LIABILITY IN A PRIOR PERIOD IN WHICH THERE IS NO EVIDENCE OF WRONGDOING, THEREBY CREATING A CONFLICT WITH PRIOR DECISIONS OF OTHER CIRCUITS.

The Ninth Circuit Court of Appeals concluded that, after examining the evidence, it was not plain error to rule that Petitioner had failed to pay properly the excise wager tax. The Ninth Circuit, however, side-stepped the point of Petitioner's contention. As to a certain portion of the verdict, it is conceded that there is sufficient evidence to uphold the jury verdict. But during the time period from February, 1964 to March, 1965, there is simply no evidence that Petitioner was not paying properly the excise wager tax. What the jury in fact did, and this was upheld by the Ninth Circuit, was use evidence of subsequent wrongdoing to impose liability in a prior period where there is no evidence of wrongdoing. This has been specifically rejected in other Circuits.

In *Carson v. United States,* 560 F. 2d (5th Cir. 1977), the court held that a factual foundation had to be established for all periods of illegal activity despite evidence of wrongdoing in subsequent periods. This same position has been adopted in the Third Circuit. See *Gerardo v. Commissioner of Internal Revenue,* 552 F. 2d 549 (3rd Cir. 1977). Indeed, in a related case, this Court has held that a projection of tax liability is allowed in situations where the taxpayer has failed to keep records, but that the determination of liability still must have a *factual* basis. *United States v. Janis,* 428 U.S. 533 (1976).

In the instant case, only one Government agent conducted surveillance of Petitioner's business during all of 1964. This agent never placed a bet without paying the tax; (agents in subsequent periods did place such bets and Petitioner did not have records to show the taxes were paid.) This agent testified that regular patrons placed bets without paying the tax during this period. But Petitioner testified in deposition that he paid the tax for regular patrons to encourage business; the agent's testimony at trial supported this conclu-

sion. At no time during 1964 were sports bets allowed without payment of tax and no contrary evidence was entered by the Government. In fact, the agent attempted to place a sports bet without paying the tax and was refused on the ground that Petitioner could not afford to pay the tax on sports wagers, too. It is thus clear, that the agent's testimony supports that of Petitioner and that there is absolutely no evidence of non-payment of the tax during 1964. It is conceded that there is evidence in later periods of no payment of tax, but during this period there is none. The judgment simply accounts for non-payment of tax throughout the period that Petitioner's place of business was under surveillance. But only in later periods is the verdict supported by evidence.

Moreover, in the first three months of 1965, there was no surveillance of Petitioner's business conducted. As to all of 1964, and the first three months of 1965, there is absolutely no evidence to justify the conclusions that Petitioner did not pay the excise tax on wagers. In fact, the Government's appellate brief states that in light of *subsequent* evidence, the jury could have inferred that the tax was not paid on all wagers during 1964 and early 1965. The Ninth Circuit upheld this statement of the law and placed itself in conflict with rulings in the Third and Fifth Circuits.

Lastly, the jury concluded that the excise tax was not paid as to certain percentages of Petitioner's *gross* wagers each month. Petitioner, however, operated both a race book and a sports book. There is no evidence whatsoever that prior to March, 1965, any sports wagers were accepted by Petitioner without payment of the tax. In fact, the Government never seized any unreported *sports* wagers, but did seize many race wagers. The jury verdict should be reduced accordingly since again, the Ninth Circuit is relying on sub-

sequent evidence of improper sports wagers to justify liability in a period where there is no evidence of wrongdoing.

In short, the ruling of the Ninth Circuit supports the position that evidence of subsequent wrongdoing can overcome a lack of factual basis of wrongdoing in prior periods. This assertion of liability in a period in which there is no factual basis is in conflict with other Circuits and basic notions of due process.

Respectfully submitted,

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Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALBERT MENGARELLI,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 80-4125

D.C. # R-79-85

MEMORANDUM

Appeal from the United States District Court
for the District of Nevada
Bruce R. Thompson, District Judge, Presiding
Argued and submitted September 14, 1981
Before: GOODWIN and HUG, Circuit Judges, AND KELLMAN,* District Judge

Albert Mengarelli had been found liable in other proceedings for conspiring to defraud the government, and the IRS assessed $2,000,000 in unpaid wagering taxes, interest, and penalties. Mengarelli paid $10,000 under protest and sued for a refund. The government counterclaimed for the total claimed to be due and the case was set for trial. This is an appeal from the resulting judgment in favor of the government in the sum of $773,553.

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*The Honorable Richard B. Kellam, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

The principal argument on appeal is that Mengarelli was prejudiced by the court's refusal to grant a continuance. He also argues a number of variations on the theme that the evidence was insufficient to support the verdict.

On the Friday before the trial was to start on Monday, counsel by telephone advised the trial judge that his client had gone to a hospital and would probably not be able to attend court on Monday morning. On Monday, when the case was called, Mengarelli's counsel reported in effect, "not ready." Counsel stated that his client was in a hospital and asked for a continuance of two or three weeks. The government resisted the motion on the ground that it had brought numerous out of town witnesses to court, together with a truckload of exhibits, and that Mengarelli's partner, who purported to own 70 percent of the business, the activities of which were in issue, was in court and ready for trial. The court, after further inquiry, decided that because the facts surrounding Mengarelli's hospitalization were vague and indefinite, and because the pressure of a new trial date "two or three weeks" later might precipitate as much stress for Mengarelli as the pending trial, there would be no point in granting an open-ended continuance. Mengarelli's counsel had offered no substantial factual information about the illness or its expected duration, and no reasonable representations that Mengarelli's problem would not recur. The trial judge balanced the inconveniences of the parties, the jury, and the court, together with the speculative nature of the representations about Mengarelli's condition and the lack of any solid reason to believe that Mengarelli would ever be available for trial. The court was satisfied that a sufficient showing to postpone the trial had not been made. The court exercised its discretion and decided to go on with the case which had been pending for some time. There was no abuse of discretion.

On the various questions about the sufficiency of the evidence, we have gone over the evidence carefully and are satisfied that it was more than sufficient to support the jury's verdict. Indeed, the sufficiency of the evidence was not even tested by a post-trial motion, and accordingly would not be before us except for the assertion that it was plain error to enter judgment on the verdict. *Trans World Airlines, Inc. v. Shirley,* 295 F.2d 678 (9th Cir. 1961); *see* 5A *Moore's Federal Practice,* ¶50.05[1] at 50–56 (2d ed. 1980)

No plain error occurred here. The government's evidence, if believed, established the government's case.

Mengarelli argues that the government's projection of unreported wagers is arbitrary and capricious. Although the jury did not accept the projection in full, Mengarelli argues that the jury was influenced by it and thus the amount of the judgment is plain error. This argument is not well-taken. Where the taxpayer subverts the statutory recordkeeping requirements (as Mengarelli did by destroying the old "white bet slips"), the IRS is permitted to determine tax liability by any reasonable method. *See DeLorenzo v. United States,* 555 F.2d 27, 29 (2nd Cir. 1977). In a similar wagering excise case, this circuit expressly approved extrapolating from the figures obtained during a raid on a similar establishment in order to assess the taxes due in the preceding period. *See Gordon v. C.I.R.,* 572 F.2d 193, 195 (9th Cir. 1977), *cert. denied,* 435 U.S. 924 (1978).

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALBERT MENGARELLI,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

) No. 80-4125
)
) D.C. # R-79-85
)
)
)
)

PETITION FOR REHEARING

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

ALBERT MENGARELLI Appellant—Petitioner above named, presents this, its petition for a rehearing in the above entitled cause, and, in support thereof, respectfully shows:

I.

On page one of the Memorandum of this Court affirming the lower Court's decision, it is stated that "[T]he of discretion, this Court further stated, at page two, that "[T]he trial judge balanced the inconvenience of the parties, the jury, and the Court, together with the speculative nature of the representations about Mengarelli's principal argu-

ment on appeal is that Mengarelli was prejudiced by the Court's refusal to grant a continuance." In concluding that there had been no prejudice and thus no abuse condition and the lack of any solid reason to believe that Mengarelli would even be available for trial." These statements exhibit an improper understanding of this issue as delineated by the case authorities in Mengarelli's brief.

First, Mengarelli need not *show* any prejudice resulting from the denial of the Motion, as suggested by the first quote above. In circumstances where the health of a party is at issue, the absence of a party is presumed to be prejudicial. Thus, where a moving party demonstrates a health condition and the opponent offers no showing of substantial prejudice, it is reversable error to deny a continuance. *Gaspar v. Kassum,* 493 F 2d 396 (D.C. Cir. 1941). The burden is on *the opponent* to show prejudice from the continuance. Indeed, the prejudice resulting from a party's absence is rather obvious: inability to confront witnesses, inability to assist counsel in preparation and cross-examination, and inability to testify in his own behalf. Appellee admitted this at trial (R.T. 6).

This Court, in the second quote above, finds the lower court's 'balancing of inconveniences' to be an appropriate determination of such a Motion, It is not. All of the authorities on this issue state clearly that once the record demonstrates a serious condition and no serious prejudice to the opposing party, the Motion for Continuance must be allowed and it is reversable error to not do so. *Gaspar, supra; Latham v. Crofters Inc.,* 492 F 2ds 193 (4th Cir. 1974); *Royster v. Lederle,* 128 F 2d 197 (6th Cir. 1942); *Harrah v. Morgenthau,* 89 F 2d 863 (D.C. Cir. 1937). These cases do not approach the problem as being one of 'balancing.' If a health problem is demonstrated, the opponent

must show serious prejudice. And the conveniences of "the parties, the jury, and the Court" are not to be considered. See, e.g., *Cornwell, supra.*

Set in its proper format, the next question becomes whether a serious condition was shown by Mengarelli. This Court states in Memorandum that "Mengarelli's counsel had offered no substantial factual information about the illness . . " In fact, an Affidavit by Mengarelli's counsel and letters from two doctors were submitted. (CR 41). One letter stated that Mengarelli was "experiencing severe anxiety and depression manifested by tenseness, aggitation, difficulty sleeping and difficulty concentration." (CR 41, pp 6–7). The letter went on to state that Mengarelli had been hospitalized and was undergoing extensive tests and observation. (CR 41, p. 8). Moreover, Mengarelli was on medication. (R.T. 4). Never once did Appellee suggest that the condition was contrived or for purposes of delay. Indeed, Appellee investigated the condition of Mengarelli and found the condition to be real and serious:

> "It seems that there is substance to Mr. Mengarelli's condition at this point, the fact that he is hospitalized." (R.T. 369–70)

Cornwell, spura, addressed much this same type of circumstance. There, prior to trial, appellant was deposed. Upon the trial date, appellant provided an Affidavit of illness stating that she was suffering from a *nervous condition* brought on by the stress of the deposition. The lower court denied the continuance and was reversed by the Appellate Court since the record showed a serious condition and no serious injury to the opposing party. Mengarelli has

thus provided authority for the proposition that a nervous condition qualifies as a serious illness. And again, *Appellee never questioned the seriousness of Mengarelli's condition.*

The final question thus becomes whether serious prejudice would have resulted as to Appellee if the continuance was granted. Appellee's *sole* argument was that witnesses had been brought from out of town and many exhibits had been brought to the courtroom. (R.T. 6). First of all, Mengarelli requested a continuance several days prior to the trial date. (CR 33). Most importantly, however, the only objection of Appellee was as to inconvenience. No prejudice was shown. Indeed, *Appellee never even argued that a continuance would be prejudicial to the case.* And it must be again noted that there should be no balancing of conveniences. Reversable error results in denial of a continuance where a serious condition is shown *unless* there is *substantial prejudice.* See, e.g., *Cornwell, supra.* No such showing was made here.

It is thus clear that the lower Court did exercise its discretion in denying the continuance, but that in doing so, it committed reversable error. Appellee has offered no case authority to counter this position. Once a serious condition was shown and no serious prejudice was shown by the Appellee, a continuance *must* have been granted.

II.

Mengarelli agrees with this Court's determination that plain error must be demonstrated in this case. Mengarelli also agrees that the IRS may project tax liability by any reasonable method where taxpayer has failed to provide records. But the resulting determination of tax liability must have a *factual basis. United States v. Janis,* 428 US 533 (1976); *Carson v. United States,* 560 F 2d 696 (5th Cir. 1977).

All of Mengarelli's tax liability for 1964 was based on the observations of Agent Wheeler. (R.T. 85). Agent Wheeler observed the making of proper bets. (R.T. 85). He also observed bets on white slips of paper by regular patrons. (R.T. 101). He also became aware that Mengarelli was paying the wager tax himself on these white slip wagers. (R.T. 117). At no time did Agent Wheeler ever place an illegal bet. (R.T. 118–119). Mengarelli testified at deposition that he accepted white slip wagers during this time but that he absorbed the tax and properly paid the tax on all wagers. (R.T. 374). Thus, Agent Wheeler's testimony supports that of Mengarelli.

The jury concluded that Mengarelli failed to report ten to twenty percent of all wagers during this period. They so concluded despite the above evidence. Moreover, no evidence was presented by Appellee that illegal sports wagers were allowed during this period. Indeed, Appellee never seized any illegal sports wagers. (R.T. 302). Agent Wheeler attempted to place an illegal sports bet but was refused because of the profit margin in the sport book, implying that Mengarelli could not afford to absorb the tax on sports wagers as well. (R.T. 93). It is clear that there is absolutely no basis to conclude that ten to twenty percent of all wagers were not reported during this period.

Appellee argued in brief, however, that in light of *subsequent* evidence, the jury could conclude that wagers were not reported during 1964. (Appellee's Brief p. 21). This contention has been specifically rejected in *Carson v. United States,* 560 F 2d 696 (5th Cir. 1977). There the Court held that a factual foundation for all illegal activities had to be shown despite evidence of wrongdoing in *later* periods. Accord, *Gerardo v. Commissioner of Internal Revenue,* 552 F 2d 549 (3rd Cir. 1977). No evidence exists to support the

jury's verdict as to the year 1964. The fact that no post-trial motions were made is irrelevant where plain error exists. *Centraal Stikstof Verkoop Kauter, N.V. v. Walsh Stevedoring Co.*, 380 F 2d 523 (5th cir. 1967).

In January, February, and March of 1965, Appellee conducted no surveillance activities of Mengarelli. In light of the foregoing comments in Section II, it is clear that no factual basis can exist for the jury's conclusion that thirty-five percent of all wagers were not reported during this period. The verdict simply constitutes plain error.

As to the subsequent periods, Appellant disputes the conclusions by the jury but will not here argue those contentions since the rule of plain error governs the case.

As noted, no illegal sports wagers were ever seized by Appellee. As noted, no evidence as to illegal sports wagers during the assessed period up to March, 1965 was ever provided by Appellee. The jury verdict was based on a percentage of total wagers. As to this portion of the verdict, at least, plain error exists.

As to the period of assessment from March, 1965, up until November, 1965, the jury's inclusion of sports wagers in the verdict is simply plain error. While some evidence was introduced which merely *suggested* illegal sports wagers, Appellee openly admits to relying on the fact that illegal *race* wagers were allowed in order to justify inclusion of sports bets. (Appellee's Brief p. 34). This is clearly improper since a factual foundation for all illegal activity must be laid. See e.g., *Carson, supra.*

It is thus clear that the inclusion of sports bets in the jury verdict is unsupported by the evidence and constitutes plain error. The jury verdict as to the period February, 1964, to November, 1965, must be re-computed.

As demonstrated, very serious concerns have been overlooked by this Court. Most particularly, the failure of the trial court to grant Mengarelli's Motion for Continuance was quite clearly reversable error and must be so recognized by this Court.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this Petition for rehearing be granted, and that the Judgment of the District Court be reversed.

Respectfully submittted,

By _____

JEROME L. BLUT
Attorney for Appellant-Petitioner
300 South Fourth Street, #600
Las Vegas, Nevada 89101

I, JEROME L. BLUT, attorney for Appellant-Petitioner, do hereby certify that the foregoing Petition for a Rehearing of this cause is presented in good faith and not for purpose of delay.

_____

JEROME L. BLUT

CERTIFICATE OF SERVICE BY MAIL

Pursuant to Rule 5 (b) of the Federal Rules of Civil Procedure, I, JEROME L. BLUT, certify that on the 17th day of November, 1981, I deposited in the United States Mail, with postage prepaid, one copy of the within Petition for Rehearing addressed to each of the following:

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Assistant Attorney General
Tax Division
U.S. Department of Justice
Washington, D.C. 20530

GILBERT E. ANDREWS
Chief, Appellate Section
U.S. Department of Justice
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APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALBERT MENGARELLI,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

) No. 80-4125
)
) D.C. # R-79-85
)
ORDER

Before: GOODWIN and HUG, Circuit Judges, AND KELLMAN*, District Judge

Appellant's petition for rehearing is denied.

*The Honorable Richard B. Kellam, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Opposition

Office - Supreme Court, U.S.
FILED
MAY 19 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1777

In the Supreme Court of the United States

OCTOBER TERM, 1981

ALBERT MENGARELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
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Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Scientific Holding Co. v. *Plessey, Inc.*, 510 F. 2d 15 6

Wyller v. *Fairchild Hiller Corp.*, 503 F. 2d 506 5

Statute:

Internal Revenue Code of 1954:

Section 4401 ..... 1, 2

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1777

ALBERT MENGARELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In this federal wagering tax case, petitioner seeks review of the decision below holding (1) that the trial court did not abuse its discretion by denying his request for a further continuance on grounds of his alleged illness; and (2) that the jury's verdict that petitioner failed to report and pay excise tax on wagers he received was not "plain error."

The pertinent facts may be summarized as follows: During the periods in issue (February 1964 - February 1966) petitioner owned and operated, in partnership with another individual, the Rendezvous Race & Sports Book (the "Rendezvous"), a licensed book-making establishment in Las Vegas, Nevada (Tr. 35-36). In February 1964, the Internal Revenue Service initiated an investigation of petitioner's reporting of wagers for purposes of the federal excise tax on wagering imposed under Section 4401 of the Internal

Revenue Code of 1954. Between February 1964 and January 1966, several undercover agents of the Internal Revenue Service made extensive visits to the Rendezvous. Based on their observations, they concluded that although petitioner was reporting and paying the tax on wagers placed on the printed ticket forms that the Rendezvous was required by state law to use, he was engaged in a tax avoidance scheme in which certain wagers were placed on slips of white paper, and were not reported (Tr. 44-45, 85-87, 132-133, 207-208, 272-273).

In February 1966, the Internal Revenue Service, pursuant to search warrants, searched the premises of the Rendezvous, petitioner's apartment, and the Rendezvous' warehouse, and seized more than 300,000 printed bet tickets covering the period January 1964 through February 1966, as well as several bundles of white slips reflecting bets that had been placed during the nine day period ending on the day of the raid (Tr. 267-269, 273, 281, 288-289).

In order to determine petitioner's correct liability for wagering excise tax for the period during which white slip betting activity had been known to occur (February 1964 through February 1966), the Service projected unreported wagers, based on the seized white slips representing wagers for the one-week period February 12 through February 18, 1966 (Tr. 286-291). Based on that projection, the Internal Revenue Service assessed petitioner for additional excise taxes, civil fraud penalties, and interest, aggregating some $2,000,000 (Pet. App. 1a).[1]

Petitioner paid $10,000 under protest and brought this refund suit in the United States District Court for the District of Nevada. The government counterclaimed for the

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[1]The investigation of the Rendezvous led to petitioner's conviction for conspiring to evade federal excise tax. *Mengarelli* v. *United States*, 426 F. 2d 985 (9th Cir. 1970), cert. denied, 400 U.S. 926 (1970).

total amount claimed to be due, and the case was set for trial (Pet. App. 1a). One week before the trial was scheduled to begin, petitioner's counsel moved for a continuance, stating that he was not prepared to go forward. The court denied that motion. On the morning of the trial, Tuesday, October 9, 1979, counsel for petitioner moved for a continuance on grounds that petitioner could not be present. He submitted letters from two physicians, stating that petitioner was suffering from anxiety and depression, and had been hospitalized the previous Friday. The government opposed the motion, noting that there had been extensive preparation for the trial, that petitioner's deposition was available, and that petitioner's partner was also a party and was present as a witness. The court denied the motion, citing the above grounds, and also stated that the doctors' letters "which are not sworn to * * * did not indicate, to me, at least, that Mr. Mengarelli's present situation is serious" (Tr. 8). The court also stated that it believed petitioner's situation was contrived. The court, however, granted petitioner leave to renew the motion at the end of the government's case, and stated that it would consider excusing the jury for two weeks if it appeared advisable (Tr. 3-10). At the end of the following day's testimony, petitioner's counsel renewed his motion. The court directed him to proceed with his case, with leave to renew the motion at the close of the trial (Tr. 360-362).

On the morning of Thursday, October 11, 1979, petitioner's counsel assured the court that petitioner would be present to testify at trial if a continuance were granted until the next week, stating (Tr. 369):

> The information I have is that Mr. Mengarelli should be released from the hospital this week. I have represented to the Court that I think it is essential that he be here. I would renew my request that we put this matter

> over until the middle of next week, and I will get Dr. Masters to get him properly sedated, if that has to be done, so that he will be here to testify.

Petitioner's counsel renewed his motion for a continuance at the close of his case that day. The following exchange occurred (Tr. 573):

> THE COURT: It is quite probable that Mr. Mengarelli will be available by Tuesday of next week to appear as a witness?
>
> MR. FADGEN: That is my understanding, your Honor.
>
> THE COURT: All right. This trial will be continued until 9:30 o'clock on Tuesday, October 16th.

When the trial resumed on October 16, petitioner was not present. Counsel offered no explanation for petitioner's absence, made no statement as to his condition, and made no further motions for a continuance.

1. Petitioner now contends (Pet. 5-7) that the trial court improperly denied his request for a continuance to permit him to testify. He asserts that he had demonstrated (1) a "serious condition" preventing him from testifying at trial, and (2) lack of prejudice to the government, and, therefore, it was an abuse of discretion to deny his request for a continuance. Petitioner's claim that the courts below reached erroneous conclusions as to these factual matters is not appropriate for further review by this Court.[2]

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[2]Petitioner's assertions of conflicts among the circuits with respect to (1) the denial of his request for a continuance and (2) his argument that the jury's verdict was "plain error," are founded entirely on his view of the facts, which the court below rejected.

Petitioner omits any reference to the fact that he was granted a continuance on Thursday, October 11, 1979, on his counsel's representation that it was "quite probable" petitioner would be available to testify the following Tuesday (Tr. 573). Moreover, petitioner failed to appear on the continued date, although his absence was entirely unexplained, and his counsel made no further motion for a continuance, nor any further statements relating to petitioner's state of health or to the need for his testimony. Petitioner thus obtained the relief he sought, and requested nothing further. If he desired a further continuance, he failed to give the court any indication of his intention, and is therefore foreclosed from raising the issue on appeal. *Wyller* v. *Fairchild Hiller Corp.*, 503 F. 2d 506, 509 (9th Cir. 1974).[3]

Petitioner also contends (Pet. 7-10) that the court of appeals erred in rejecting his contention that the jury's verdict with respect to the period February 1964 through

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[3]The court of appeals correctly held that the trial court did not abuse its discretion. Petitioner failed to establish that he was too ill to be present at the trial. In support of his motion for a continuance, petitioner submitted only his counsel's affidavit and letters from two physicians. Read carefully, those documents said little more about his specific state of health other than that he was upset and nervous. The trial court properly found that those letters did not indicate that petitioner's condition was serious enough to justify a continuance (Tr. 8), and the court of appeals found the facts surrounding petitioner's hospitalization to be "vague and indefinite" (Pet. App. 2a). Petitioner's statements that" [t]he Government substantiated all of * * * [his] claims [of illness]" (Pet. 3) and "concluded that Petitioner's condition was serious and that he was legitimately hospitalized" (Pet. 7) are directly contrary to the facts. The government has never conceded, much less confirmed, that petitioner's claims of serious illness were valid (see Tr. 362, 368-369). Moreover, although petitioner observes correctly that the *government* "never once * * * suggest[ed] that Petitioner was acting in bad faith" (Pet. 3), he fails to state that the trial court itself made such a suggestion (Tr. 9). In addition, the government had expended considerable money, time and effort in preparing for the trial, and would have been prejudiced by an indefinite continuance (see Pet. App. 2a).

March 1965 was "plain error."[4] This fact-bound question is likewise inappropriate for further review by this Court.[5]

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[4]Petitioner failed to move in the trial court for a directed verdict, for judgment n.o.v. or for a new trial, and is, therefore, precluded from contending on appeal that the verdict was not supported by the evidence, absent plain error. See, *e.g., Scientific Holding Co.* v. *Plessey, Inc.*, 510 F. 2d 15, 28 (2d Cir. 1974).

[5]Petitioner renews several factual arguments, all of which were rejected by, the court below. His assertion (Pet. 8) that "during the time period from February, 1964 to March, 1965, there is simply no evidence that Petitioner was not paying properly the excise wager tax," is contradicted by the record. The government witnesses, through detailed testimony, confirmed by the Rendezvous' own records, provided convincing evidence that petitioner had underreported wagers during the entire 25-month period beginning in February 1964. Internal Revenue Agents observed white slip bets placed at the Rendezvous in the months of February 1964 through November 1964; April 1965 through November 1965 and January 1966 (Tr. 78, 86-88, 93, 129-132, 196-199, 207-209, 272-273). Those agents recorded the details of hundreds of white slip bets which they observed customers placing, as well as white slip bets one agent personally placed. The agents later searched a computer printout of all the printed bet tickets placed at the Rendezvous during this period, and established that no printed tickets existed for any of the white slip bets observed (Tr. 100-102, 121-124, 154-161, 216-217). Since the evidence established that only bets placed on printed tickets were reported on excise tax returns, it follows that wagers were underreported in every month in issue (Tr. 100-102, 153-159, 216-217). Cf. *Carson* v. *United States*, 560 F. 2d 693, 699-700 (5th Cir. 1977). Moreover, there was considerable additional evidence of petitioner's underreporting prior to April 1965 (see, *e.g.*, Tr. 88-92), including testimony of a former Rendezvous employee that the practice dated back to the early 1960's (Tr. 231-240). The fact that there was no surveillance of the Rendezvous during the months of January, February and March 1965 (see Pet. 9) is not significant. It was established that white slip betting was a regular and continuous practice before and after those months. The jury was entitled to infer that that practice was no different during those few intervening months. *Bahoric* v. *Commissioner*, 363 F. 2d 151, 154 (9th Cir. 1966). Finally, petitioner's assertion (Pet. 9) that there was no evidence that he failed to report any sports, as opposed to race, wagers before March 1965, is contrary to the facts (see Tr. 88-92, 145-147, 154-155).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1982

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